BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD H. PREASE III	)	
Claimant	)	
	)	
VS.	)	
	)	
PCE CONSTRUCTORS, INC.	)	
Respondent	)	Docket No. **1,040,254**
	)	
AND	)	
	)	
GRAY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the August 17, 2010, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

This appeal comes before the Board on claimant's request for an authorized physician. This is a claim for a December 29, 2007 accident and resulting back injury. In the August 17, 2010 Order the ALJ designated Dr. Whitaker as claimant's authorized treating physician. It is implied from that Order that the ALJ reconsidered the issue of whether claimant injured his low back in an accident arising out of and in the course of his employment with respondent as the ALJ commented upon reviewing evidence and held:

> Claimant requests the treatment of Dr. Whittkaer [sic]. The Court previously ordered a list of three physicians from which the Claimant was to choose an authorized treating physician. For reasons that are not clear to the Court, Dr. Bailey gave a causation opinion, and based on that opinion, the Respondent denied treatment. After a review of the prior preliminary hearing, a surveillance video and other testimony the Court makes the following order.
>
> Dr. Whittaker [sic] is designated as the authorized treating physician. The surveillance video is inconclusive. Further, the Respondent in disregarding the Court's previous order of treatment chose an inappropriate remedy.[1]

[1] ALJ Order (Aug. 17, 2010).

In its brief to the Board, respondent raised the following issues: (1) "Whether claimant's need for medical treatment is a result of an injury arising out of and in the course of claimant's employment", and (2) "Whether claimant's need for medical treatment is reasonably necessary to cure the effects of the claimant's alleged injury."[2] Respondent argues claimant has failed to prove the medical treatment he requests is the result of an injury that arose out of and in the course of his employment. The respondent denies that it improperly halted the medical treatment from Dr. Alexander Bailey and, instead, argues it is only responsible for such medical treatment the doctor finds is related to the work injury. And, in this instance, since Dr. Bailey concluded the proposed medical treatment is not related to a work injury, respondent maintains it is not responsible for such treatment. Accordingly, respondent requests the Board to deny claimant's requests for medical treatment and compensation.

Claimant requests the Board to affirm the August 17, 2010 Order. Claimant maintains the issue of whether claimant's low back injury arose out of and in the course of his employment with respondent was not an issue to be addressed at the March 3, 2010 preliminary hearing or in the ensuing August 17, 2010 Order as the issue was previously decided in claimant's favor in an October 12, 2009 Order, which was not appealed. Accordingly, claimant asserts that respondent improperly terminated, or interfered with, medical treatment previously awarded and, instead, should have sought appropriate relief from the ALJ. In the alternative, claimant argues that Dr. Bailey was unsure of the source of claimant's low back injury and, therefore, the doctor's opinions do not establish that claimant injured his low back somewhere other than at work.

The issue before the Board on this appeal is whether claimant has established his present need for medical treatment is the result of an accident that arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member having reviewed the whole evidentiary record filed herein, makes the following findings of fact and conclusions of law:

The claimant began working for respondent as an electrician in May 2007. He alleges that while working on a project for respondent in Coffeyville, Kansas on December 29, 2007, his back popped when he was picking up wire. He testified, in part:

> I found the wire I had to go get, it was underneath the table [sic] tray, about three feet tall. I bent over to go get it, I knelt down to figure out which was the right wire to take up to the 14th floor, and when I was picking the wire up I heard my -- my

[2] Respondent's Brief at 1 (filed Sep. 17, 2010).

> back popped and I hit my head on the cable tray and I fell back down to the ground.[3]

Claimant testified that he crawled out from under the cable tray and finished his shift. That day he allegedly reported the incident to Brent Johnson, one of his supervisors and two co-workers, James Stephenson and Gary Vaughn. Claimant also maintains that on January 3, 2008, he told another supervisor, Roy Hodges, about the work injury.

Claimant missed work the day following the alleged accident and contends that Mr. Johnson authorized him to seek medical treatment at an emergency room. There is no question that on December 30, 2007, claimant visited the Jane Phillips Medical Center in Bartlesville, Oklahoma, which was the closest hospital to claimant at the time. Likewise, there is no question that the emergency room records from that visit indicate that claimant had experienced intermittent low back pain for two months and increased left low back pain for two days. Those records read, in part:

> The patient is a 32 years old Male [sic] who presents with lumbar pain. The onset was gradual, Has been having pain intermittently for 2 months that never goes away but is better at times. Has had increased pain for the last 2 days. His work dies [sic] require a lot of lifting and climbing. and [sic] Has [sic] not has [sic] any treatment in the past 2 months. Pain is worse with sitting. Location of pain: Left lumbar. Character of pain: achy and sharp. The function limitation is negative. The mitigating factor is negative. Prior episodes: frequent and age 14 he strained his back in an MVC. There are risk factors including heavy lifting and repetitive stress.[4]

Moreover, the triage nurse's notes read, in part:

> INTERMITTENT LOW BACK PAIN X 2 MONTHS, LT. LOW BACK PAIN X 2 DAYS, RADIATION OF PAIN DOWN LT. LEG, NO KNOWN INJURY, REPORTS "I CLIMB A LOT [SIC] AT WORK[.]"[5]

But at his deposition in July 2008, claimant denied having any low back problems before the alleged incident on December 29, 2007.[6]

On December 31, 2007, claimant underwent an MRI, which revealed a small central herniated disk at L4-5 and a very large central and leftward herniation at L5-S1. The hospital's emergency department advised claimant to follow-up with his personal physician.

---

[3] Prease Depo. at 10.

[4] P.H. Trans. (Aug. 6, 2008), Resp. Ex. 1.

[5] *Ibid*.

[6] Prease Depo. at 21.

Claimant then began seeing Dr. Katherine Gooch, who referred him to Dr. Abudu for three epidural injections that claimant received between early March and early April 2008.

Claimant maintains he missed three days of work immediately following his alleged accident and that he returned to work for respondent on January 3, 2008, and worked until January 16, 2008, when he separated from respondent.

Two preliminary hearings have now been conducted in this claim. After the first hearing, which was held in August 2008, and after receiving the deposition testimony of several witnesses, the ALJ awarded claimant medical benefits after finding claimant had injured his low back working for respondent. The ensuing preliminary hearing Order dated October 12, 2009, required respondent to provide the names of three physicians from which claimant would select a treating physician. Claimant selected Dr. Alexander Bailey.

Dr. Bailey examined claimant on December 18, 2009, almost two years after the alleged injury, and authored a medical report dated the same. Although the ALJ had ruled on the cause of claimant's low back complaints and Dr. Bailey's role was to treat claimant's low back, nonetheless, a significant portion of the doctor's report addressed the doctor's opinion on causation. As part of his analysis, the doctor considered a surveillance video that had been provided by respondent's insurance carrier. The doctor's report reads in part:

> There are emergency medical record notes indicating back pain for approximately two months. The patient reports an injury, apparently took a voluntary leave, sought out care through his primary care physician and then filed a Workers' Compensation claim in approximately March. I find no specific event occurring resulting in the patient's back pain and this is as much likely to be a personal medical condition as apparently related to his employment. Based on the patient being off work for two years, based on his clinical examination today, and based on the surveillance tapes that basically show the patient in zero pain whatsoever, I would tend to identify this patient as not sustaining an on-the-job work injury about December of 2007, not to have had a repetitive use injury to the patient's lumbar spine, and would currently side with the fact that this is most likely a personal medical condition not directly related to the patient's employment. Therefore, based on the available information that I have had to review, I find no evidence of an on-the-job work injury of specific nature to identify as the patient's cause for his condition. I believe the patient's need for medical and/or surgical attention is more likely than not, within a reasonable degree of medical certainty, not related to an on-the-job work injury. Nor do I believe the [sic] and [sic] a prevailing factor in this patient's condition is related to an on-the-job work injury.[7]

[7] P.H. Trans. (Mar. 3, 2010), Resp. Ex. 1.

Dr. Bailey likewise addressed claimant's work restrictions and potential functional impairment rating, both of which the doctor indicated were dependent upon whether claimant's low back injury was deemed to be work-related. For example, the doctor noted claimant should be limited to light work should the injury be work-related but, if not, claimant be released to regular work. The doctor wrote, in part:

> I would place the patient in a light physical demand level if the court decides this is work-related. This would be through further evaluation and treatment, and hopefully improvement over time. If ultimate causation is sided with my statements as it relates to his Workers Compensation injury, he would be released to a regular physical demand level on a permanent basis. MMI, rate and release his purported work injury based on causation statements. As this has been presented to me as an evaluation and treatment, pending that ultimate court and legal decision, I officially have him at a light physical demand level until these final issues can be worked out. I would be happy to treat the patient regardless, but I am very cautious and concerned that outcomes would be quite poor in this patient.[8]

Despite questions surrounding the cause of claimant's low back and left leg symptoms, Dr. Bailey recommended another MRI scan. Needless to say, respondent balked at providing claimant with the recommended medical treatment for the low back, which led to a second preliminary hearing and this appeal.

Claimant's credibility is intertwined with the issues surrounding claimant's alleged accident and injuries. In addition to the history of back complaints as set forth in the emergency room records, respondent presented the testimonies of several others who disagree with claimant's recollection of pertinent events.

For example, Roy Hodges and Brent Johnson, both supervisors to whom claimant allegedly reported his accident, deny that claimant ever reported a work injury to either of them. And Mr. Hodges recalls an occasion sometime in 2007 when claimant returned to work after an absence and indicated he had hurt his back while moving.[9] Mr. Johnson, the general superintendent of the Coffeyville project, testified that in September 2007 claimant telephoned and advised he had hurt his back when he fell off a porch while moving a refrigerator. Mr. Johnson further indicated that claimant was required to provide a doctor's full release before returning to work, which claimant provided. Furthermore, Mr. Johnson testified that after September 2007 claimant made back complaints, which claimant attributed to the refrigerator incident.[10] In addition, Mr. Johnson denies that he authorized claimant to seek medical treatment for the alleged work injury.

---

[8] *Ibid*.

[9] Hodges Depo. at 7.

[10] Johnson Depo. at 12-13.

Dennis Vollmer and Gary Vaughn also testified by deposition on behalf of respondent. Mr. Vollmer, who was one of claimant's supervisors in December 2007, testified he did not learn of claimant's alleged work injury until about mid-April 2008.[11] At that time claimant allegedly admitted he had not previously reported his injury to respondent. Mr. Vaughn, another one of claimant's supervisors at the time of the alleged accident, testified that claimant never reported a work injury to him while working together in Coffeyville.[12] Nonetheless, both Mr. Vollmer and Mr. Vaughn knew in early January 2008 claimant's back was hurting, both enjoyed working with claimant, and both believed him to be honest.

At the March 2010 preliminary hearing, claimant requested the ALJ to find that respondent had unreasonably refused to provide claimant with the previously ordered medical benefits and to specifically designate Dr. Whitaker of Wichita, Kansas, as the authorized physician. Despite claimant's objections to revisiting the issue of causation, the ALJ reviewed the evidence and, once again, granted claimant's request for medical benefits.

There is no question the ALJ had previously decided the issue of whether claimant's low back injury and symptoms arose out of and in the course of his employment with respondent. The second preliminary hearing was requested by claimant to address claimant's inability, despite the ALJ's initial order, to obtain medical treatment for his low back. This Board Member agrees with the ALJ's conclusion that respondent inappropriately disregarded the October 12, 2009 Order requiring it to provide claimant with medical treatment for his low back injury. Respondent is reminded that it is the ALJ's province to determine whether a particular injury arose out of and in the course of employment. In this instance, respondent has taken two bites of the apple. After the adverse ruling from the ALJ, respondent's insurance carrier embarked upon obtaining a causation opinion from Dr. Bailey to attempt to avoid liability. In short, the undersigned Board Member does not condone the manner in which respondent has proceeded in this claim.

The ALJ, however, did not err in considering the issue of causation at the recent preliminary hearing. Claimant was requesting the ALJ to authorize a specific doctor to provide medical treatment. There is no question that before an injured worker is entitled to receive medical benefits under the Workers Compensation Act such treatment must be related to the alleged work injury. Accordingly, the relationship between the alleged injury and the benefits requested may arise at various junctures of the claim.

---

[11] Vollmer Depo. at 12.

[12] Vaugh Depo. at 10.

This Board Member finds Mr. Johnson, Mr. Hodges, Mr. Vollmer, and Mr. Vaughn are credible witnesses. Considering their testimonies in light of the emergency room records that omit mention of the alleged incident at work, the undersigned finds claimant has failed to prove it is more probably true than not that he injured his back at work on December 29, 2007, as claimed. Accordingly, the undersigned finds and concludes the August 17, 2010 Order should be reversed and claimant's request for medical benefits should be denied.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, the August 17, 2010, preliminary hearing Order entered by ALJ Thomas Klein should be, and hereby is, reversed and claimant's request for workers compensation benefits is denied.

IT IS SO ORDERED.

Dated this _____ day of February, 2011.

_____
HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[13] K.S.A. 44-534a.

[14] K.S.A. 2010 Supp. 44-555c(k).